Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTA), through the undersigned and pursuant to Federal Communications Commission (FCC) Rules 1.415 and 1.419,[1] hereby submits its reply comments in the above-docketed proceeding. USTA filed comments in this proceeding on May 3, 2002, wherein it set forth it positions on the questions presented in the *Wireline Notice*.[2] In these reply comments, USTA will address comments filed by other interested parties concerning the provision of wireline broadband Internet access transmission facilities to unaffiliated Internet Service Providers (ISPs); the application of *CI-II and III* regulations to wireline broadband

[1] 47 C.F.R. §§ 1.415 and 1.419.
[2] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards*

Internet access transmission facilities; the universal service support obligations of broadband providers and the applicability of the Communications Assistance for Law Enforcement Act (CALEA) to wireline broadband equipment and facilities.

SUMMARY

The FCC must consider the full extent of competition in the broadband market as it considers the appropriate legal and policy framework to be applied to ILECs that provide broadband facilities and broadband-based services. Critics of the FCC's proposal to accord ILECs regulatory treatment that is equivalent to cable, its major competitor in the broadband access to the Internet market, present arguments that are backward looking. They seek to retain regulations on ILECs that are from a different era and were promulgated to address a regulatory environment that bears no relationship to today's competitive broadband mass market. The FCC must adopt rules that are relevant and appropriate to the present and create an environment that facilitates increased broadband investment in the future.

ILEC provision of broadband transmission to an unaffiliated Internet service provider (ISP) is private carrier service. Those commenters that argue to the contrary offer no persuasive reason for why the FCC should find it to be private carriage when cable services providers provide standalone broadband transmission to unaffiliated ISPs[3] but common carriage when it is provided by an ILEC. AT&T's position that ILECs "have always provided standalone

and Requirements, CC Docket No. 02-33 and CC Docket Nos. 95-20, 98-10, FCC 02-42, Notice of Proposed Rulemaking (rel. Feb. 15, 2002) (*Wireline Notice*).

[3] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling;* GN Docket No. 00-185; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (rel. Mar. 15, 2002) (*Cable Declaratory Ruling*), at ¶ 54.

broadband transmission services on a common carrier basis" is insufficient justification for such bald discrimination.

The FCC's *CI-II and III* regimes serve no necessary role in today's competitive broadband market. These regimes are predicated upon an ILEC being dominant in the market for basic transmission services. While once appropriate in the market for voice services, the requirements imposed upon ILECs under *CI-II and III* are unwarranted in the broadband access to the Internet market where ILECs are non-dominant and compete with cable companies that control twice their market share.

Most commenters recognize the importance of the FCC taking no action with respect to the regulatory classification of broadband facilities and broadband Internet access service that would serve to undermine the viability of universal service high cost assistance mechanisms. Satellite providers fail to make a reasonable case for why their broadband transmission is not telecommunications and why they should not contribute to universal service support like terrestrial-based broadband transmission providers and broadband Internet access service providers.

The FCC does not have the ability to change the scope of law enforcement's ability to compel compliance under CALEA as to those specific services and facilities covered by CALEA.

DISCUSSION

On May 24, 2002, three weeks after comments were filed in this proceeding, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *United States Telecom Association, et al., v. Federal Communications Commission and United States of America*, Nos. 00-1012 *et al.* (D.C. Cir. May 24, 2002) (*USTA v. FCC*). The Court overturned

both the FCC's rules setting forth the unbundled network elements (UNEs) that incumbent local telephone companies (ILECs) must make available to their competitors and the FCC's line sharing rules. In overturning the rules concerning UNEs and line sharing, the D.C. Circuit determined that the FCC's rules failed to satisfy the test for unbundling set forth at Section 251(d)(2)[4] of the Telecommunications Act of 1996, as that provision was interpreted by the United States Supreme Court in *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999).

Many of the commenters in this proceeding cite prior FCC decisions, including the recently overturned UNE and Line Sharing Orders, as support for the position that the FCC can continue its disparate regulatory treatment of ILECs that provide broadband services and facilities to the mass market and larger business market. These commenters refuse to accept the principle of regulatory parity and petition the FCC to ignore the principle as well. The Court in *USTA v. FCC* made it very clear that the FCC cannot ignore the evidence of broadband competition, that the FCC itself has identified, in its regulatory treatment of ILECs. The Court agreed with the petitioners that the FCC completely failed to consider the relevance of competition in the broadband access to the Internet service market provided by cable (and to a lesser extent satellite) when it ordered the unbundling of the high frequency spectrum of ILEC copper loops.[5] As the court stated: "[t]he Commission thus appears to acknowledge that it adopted the Line Sharing Order with indifference to petitioners' contentions about the state of competition in the market."[6] This deficiency in the FCC's Line Sharing Order resulted in the Court vacating and remanding the Order.[7] Commenters opposed to equitable regulatory treatment for ILECs may choose to remain in denial and refuse to acknowledge the true state of

[4] 47 U.S.C. § 251(d)(2)
[5] *USTA v. FCC*, slip opinion at 22.
[6] *Id.* at 23.
[7] *Id.* at 24.

broadband competition. The FCC cannot do so. It must take cognizance of the robust competition that exists in the broadband market as it proceeds in this docket to examine "the appropriate legal and policy framework under the Communications Act of 1934, as amended, for broadband access to the Internet provided over domestic wireline facilities."[8]

USTA agrees with the Statement of 43 Economists on the Proper Regulatory Treatment of Broadband Internet Access Services.[9] In their comments the Economists state:

> [T]he Commission should move promptly to eliminate existing regulations and to establish a non-regulated framework for unfettered and unbiased competition, in order to promote the fastest possible growth in the market for broadband Internet access. In particular, common carrier and unbundling obligations, such as are currently imposed, asymmetrically, on incumbent telephone companies, are likely to retard investment in this nascent, fast growing business and the growth of vigorous, facilities-based competition, at the expense of consumers.[10]

USTA believes that the Economists are absolutely correct in their assessment of the debilitating effects on consumers caused by the unwarranted regulation of ILECs providing broadband Internet access. The Economists are also correct in offering the following advice to the FCC:

> The Commission should strive to avoid asymmetrical treatment and consequent competitive handicapping of the several contestants in the broadband market. For it to impose heavier burdens on one set of facilities-based providers than on others can only discourage – as well as distort – the process of competitive innovation that is the central goal of our national telecommunications policy. The Commission should opt for deregulatory parity, in which all service providers have an opportunity to compete equally free from the heavy hand of government.[11]

As USTA stated in its comments, "the FCC cannot lawfully continue to impose substantial regulatory burdens upon ILEC mass market broadband services while imposing *de minimis*, if any, regulatory obligations on cable and other mass market broadband services. Such disparate

[8] *Wireline Notice* at ¶ 1.
[9] Filed in this proceeding and in CC Docket Nos. 01-339 and 01-337 on May 3, 2002 (Statement of 43 Economists).
[10] Statement of 3 Economists at 1.
[11] *Id.* at 5.

treatment of ILECs is unjustified and places ILECs at a severe competitive disadvantage to their broadband competitors.[12]

The Provision of Stand-alone Broadband Transmission to an Unaffiliated ISP is Private Carrier Service

USTA agree with the comments of BellSouth Corporation and Qwest Communications International that an ILEC's provision of stand-alone broadband transmission to an unaffiliated ISP is private carrier service, not common carrier service.[13]

In the *Cable Declaratory Ruling*, the FCC looked at the characterization that it should apply when a cable company provides a stand-alone telecommunications offering to an unaffiliated ISP. The FCC determined that "the offering would be private carrier service and not a common carrier service" because the cable company "determines on an individual basis whether to deal with particular ISPs and on what terms to do so."[14] In support of its conclusion the FCC cites to two D.C. Circuit decisions. First, the FCC cites to the D.C. Circuit's holding in *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir.1976) (*NARUC II*) for the proposition that the most prominent characteristic of common carriage is offering a service to all people indifferently.[15] Then the FCC contrast *NARUC II* with *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994). As the FCC notes, *Southwestern Bell* held that where a carrier makes customer decisions on an individual basis and makes an independent decision in each case whether to provide the service, and on what terms, the carrier is not required to provide service to the public indifferently.[16] The FCC then concludes that where "cable providers elect to provide pure

[12] USTA Comments at 2.
[13] *See* Comments of BellSouth Corporation at 20-24 and the Comments of Qwest Communications International at 12-21.
[14] *Cable Declaratory Ruling* at ¶ 54.
[15] *Id.* at ¶ 55.
[16] *Id.*

telecommunications to selected clients with whom they deal on an individualized basis, we [the FCC] would expect their offerings to be private carrier service.[17]

USTA see no basis upon which to treat ILECs differently where they relate to their ISP customers on an individualized basis when providing broadband transmission service. Just as such an individualized customer approach results in the characterization of the service as private carriage for cable providers, the same characterization and treatment should be applied to ILECs if they also provide an individualized customer approach in the provision of broadband transmission to an unaffiliated ISP. A contrary conclusion and the imposition of common carrier obligations on ILECs would unnecessarily and unlawfully discriminate against ILECs in favor of cable companies.

***CI-II and III* Requirements Should Not Apply to ILEC Broadband**

USTA agrees with the comments of SBC Communications, Inc. and Verizon that the FCC should not impose the requirements of *CI-II and III* on broadband, especially the obligation to unbundle and offer under tariff the telecommunications or broadband transmission component used to allow end user customer access to an ISP.[18] The record demonstrates that there is no evidence of dominance on the part of ILECs in the broadband Internet access service market or the broadband transmission market. It is unnecessary to apply such requirements where the circumstances that gave rise to these regulatory safeguards do not exist. Unlike in the narrow band world of twenty years ago, today's ISPs have choices for obtaining broadband transmission facilities. The existence of alternative broadband platforms means that ISPs are not dependent upon ILECs as a sole source for broadband transport.

[17] *Id.*
[18] *See* Comments of SBC Communications Inc. at 18-28 and the Comments of Verizon at 34-36.

Absent evidence that ILECs are dominant in the broadband Internet access service market or the broadband transmission market, the FCC should not impose dominant carrier regulations upon them. AT&T, AOL Time Warner and the host of ISPs that filed comments offer no facts that bear any relationship to the competitive realities of the broadband market. It is particularly amazing that AT&T and AOL Time Warner, two market leaders in the provision of cable broadband Internet access services, shamelessly rely on dated regulatory precedents (that have no factual relevance to today's competitive broadband environment) in order to justify their argument that *CI-II and III* obligations should be imposed on ILEC broadband transmission services provided to unaffiliated ISPs. Their arguments are specious and have largely been addressed by the D.C. Circuit in *USTA v. FCC*. There is no limitation to be found in the Telecommunications Act of 1996 and there is no credible threat of competitive harm shown by the commenters that justifies the FCC imposing *CI-II and III* obligations on ILEC broadband telecommunications. Further, commenters have not demonstrated that any public interest reason exists for discriminating against ILEC broadband telecommunications in favor of cable broadband telecommunications that have been found to merit private carrier status in providing broadband telecommunications to unaffiliated ISPs.

All Broadband Providers Should Support Universal Service

In its comments, Hughes "strongly urges the Commission not to impose universal service contribution obligations on providers of satellite-delivered broadband Internet access services."[19] Hughes offers that it has high costs to provide its satellite-delivered broadband Internet access services and would impose a tremendous burden on Hughes. USTA believes that there should be no blanket exemption for satellite-delivered broadband Internet access services. Satellite-

[19] Comments of Hughes Network Systems, Inc., Hughes Communications, Inc., and Hughes Communications Galaxy, Inc. at 1.

delivered broadband Internet access services should bear the same responsibility to contribute to universal service support as other broadband services and telecommunications providers.

FCC Action Should Not Change CALEA Requirements

CALEA requires telecommunications carriers, under certain circumstances, to ensure that law enforcement has the technical capability to conduct electronic surveillance that is otherwise lawful. Facilities that must be CALEA compliant are defined in the CALEA statute, and the FCC cannot change those definitions. Accordingly, the FCC does not have the ability to change the scope of law enforcement's ability to compel compliance under CALEA as to those specific services and facilities covered by CALEA. Likewise, the FCC is not empowered to expand the scope of CALEA. USTA would be particularly concerned if in the course of this proceeding the FCC attempted to expand the scope of the CALEA and in the process impose an unfunded mandate upon broadband providers.

Respectfully submitted,

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